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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

FOLDING CARTON RESERVE FUND, ET AL.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Cross-respondents answer the government's cross-petition by asserting that the court of appeals' judgment estopping the United States from enforcing its interest in the settlement fund surplus might be placed on an alternate basis of decision. The alternate ground to which cross-respondents refer is the alleged untimeliness of the government's motion to intervene in the district court under Federal Rule of Civil Procedure 24(a).

But as our cross-petition points out, Cross-Pet. 8 n.5, this Court need not address the timeliness of the government's motion to intervene because, under Federal Rule of Civil Procedure 71, "[w]hen an order is made in favor of a person who is not a party to the action," that person "may enforce obedience to the order by the same process as if a party." Rule 71 applies here because the court of appeals'

original mandate directing that the surplus funds be deposited in the Treasury "in the name and to the credit of the United States," 28 U.S.C. 2042, was plainly made in favor of the United States.

Cross-respondents nonetheless maintain that the government was required to intervene in the district court; that the government failed to invoke Rule 71 in the court of appeals; and that Rule 71 moots the estoppel issue. Br. in Opp. 4-5 n.4. None of those contentions has merit.

First, the government was not required to intervene in the district court because it was entitled to petition for a writ of mandamus in the court of appeals. It is well settled that mandamus is the appropriate mechanism to enforce an appellate mandate. See *General Atomic Co.* v. *Felter*, 436 U.S. 493, 497 (1978); *Will* v. *United States*, 389 U.S. 90, 95-96 (1967). Moreover, because an appellate court has inherent, plenary power to consider on its own motion whether its mandate has been violated, *United States* v. *E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 325 (1961); *Continental Insurance Co.* v. *United States*, 259 U.S. 156, 166 (1922), an appellate court can issue a writ of mandamus to enforce its mandate even "where there is no existing or future appellate jurisdiction to which it can relate," *United States* v. *United States District Court*, 334 U.S. 258, 263 (1948); accord, *Department of the Navy* v. *FLRA*, 835 F.2d 921, 923-924 (1st Cir. 1987). Contrary to cross-respondents' contention, therefore, intervention in the district court under Federal Rule of Civil Procedure 24(a) was neither the exclusive nor a required means to seek enforcement of the Seventh Circuit mandate.*

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* Indeed, cross-respondents (at least in their capacity as petitioners) agree in their joint reply brief in No. 89-927, No. 89-992, and No. 89-1081 that the government was entitled to petition the court of appeals for a writ of mandamus. On page 9 of that document they

Second, notwithstanding cross-respondents' unsupported assertion to the contrary, the government pressed its right under Federal Rule of Civil Procedure 71 to enforce its interest in the surplus settlement funds. Indeed, it did so on three separate occasions in the court of appeals. At page 39 of the government's opening brief we quoted Rule 71 and explained that it authorized the government to seek direct enforcement of the court of appeals' earlier mandate. Again, at page 7 of the "Petition by the United States to Enforce this Court's Mandate and for a Writ of Mandamus," the government quoted Rule 71 and made the same point. And again, at page 2 of the "Response by the United States to Motion to Change Title and Designation of Case," we quoted Rule 71 a third time and pointed out that intervention by the government in the district court was not a prerequisite to enforcement of the government's interest in the settlement fund as recognized by the outstanding appellate mandate. Cross-respondents are clearly incorrect in asserting that the government failed to invoke Rule 71 in the court below.

Third, Rule 71 does not "moot" the court of appeals' erroneous application of equitable estoppel in this case. Br. in Opp. 4 n.4. If cross-respondents mean that Rule 71 bars the application of equitable estoppel against a party, we disagree. A rule respecting a party's status has no bearing on the rights such a party can claim. To be sure, the government contends that the timeliness of its attempt to intervene under *Rule 24(a)* need not be reached because Rule 71 entitles the government to seek enforcement of the appellate

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contend that the court of appeals erroneously "[c]onvert[ed] a mandamus action into an ordinary appeal, denying a motion to treat the action as a mandamus proceeding, and then deciding it by the standards governing ordinary appeals rather than the higher standards applicable to mandamus actions."

mandate "as if a party." But the government's status as a party to this case is quite different from the interest it can enforce once that party status is recognized.

Because Federal Rule of Civil Procedure 71 entitles the United States to participate in this case and to enforce its interest in the surplus funds, the asserted untimeliness of the government's motion to intervene in the district court is not an independent ground for the judgment in this case. The court of appeals' ruling that the United States was estopped from asserting its interest recognized in the earlier Seventh Circuit rulings is therefore squarely presented. See 89-927 Pet. App. 10b-14b (discussing application of equitable estoppel doctrine against the United States and "invok[ing] an estoppel against the United States" here).

2. Cross-respondents do not defend the court of appeals' application of estoppel against the United States. See Cross-Pet. 3-7 (explaining why the doctrine of equitable estoppel should not be applied against the United States for reasons including those set forth in the government's submissions in *Office of Personnel Management* v. *Richmond*, No. 88-1943 (argued Feb. 21, 1990)). Instead, cross-respondents contend that the court of appeals' *original* mandate was incorrect—*i.e.*, that 28 U.S.C. 2042 does not apply to the surplus settlement fund. Those contentions—which were all resolved adversely to cross-respondents by the court of appeals in its first judgment, 89-927 Pet. App. 4g-6g—are not at issue here. The petitions for review of the earlier judgment were voluntarily dismissed pursuant to then-applicable Supreme Court Rule 53 (1980). *In re Robson*, 471 U.S. 1120 (1985). And as we argue in our brief in opposition to the petitions in No. 89-927, No. 89-992, and No. 89-1081, cross-respondents' disagreement with that court of appeals' mandate did not justify their decision to "settle [the] case on terms inconsistent with a binding prior mandate of an appellate court." 89-927 Br. in Opp. 16.

3. Cross-respondents assert that the government's cross-petition is a "tactical device" to allow it to file a brief in opposition to the petitions in No. 89-927, No. 89-992, and No. 89-1081. Not true. The United States filed a brief in opposition and a cross-petition for the precise reasons stated in those documents: We do not believe that this matter, in light of its bizarre posture and history, warrants review by this Court; but if such review is granted, it should include review of the estoppel ruling by which the Seventh Circuit prevented the United States from asserting its interest in enforcement of the prior appellate mandate.

In advancing this position, the United States is unquestionably entitled to oppose the petitions in No. 89-927, No. 89-992, and No. 89-1081 under the Rules of this Court. See Sup. Ct. R. 12.4 (with respect to certiorari, "[a]ll parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court"); Sup. Ct. R. 20.3(b) (with respect to extraordinary writs, "every other party to the proceeding in respect of which relief is desired * * * may * * * file * * * a brief or briefs in opposition thereto"). See also Sup. Ct. R. 19.6 (1980) (certiorari); Sup. Ct. R. 27.2(b) (1980) (extraordinary writs). Tellingly, cross-respondents cite to no Rule holding to the contrary, nor do they question the fact that the United States was a party in the proceedings before the court of appeals.

For the foregoing reasons, and for those stated in our cross-petition, if the Court is inclined to review the judgment of the United States Court of Appeals for the Seventh Circuit below, then this cross-petition and the petitions for review in No. 89-927, No. 89-992, and No. 89-1081 should be held pending the Court's decision in *Office of Personnel Management* v. *Richmond*, No. 88-1943. This case should then be disposed of in light of *Richmond*.

Respectfully submitted.

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